

**This Opinion is Not a
Precedent of the TTAB**

Mailed: July 13, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re CGTN C.V.

Serial No. 87448330
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Robert J. Ward, Lisa R. Hemphill and Chance L. Moser of Foley & Lardner LLP,
for CGTN C.V.

Tasneem Hussain, Trademark Examining Attorney, Law Office 118,
Michael W. Baird, Managing Attorney.

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Before Wellington, Greenbaum and Pologeorgis,
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

CGTN C.V. (“Applicant”) seeks registration on the Principal Register of the
standard character mark AGE IQ for

Cosmetic products, namely, medicated skin care
preparations, namely, skin creams, facial creams, night
creams, anti-aging creams, anti-wrinkle creams;
medicated skin moisturizers, medicated skin emollients;
medicated face and body lotions for distribution through
independent sales representatives, in International Class
5.¹

¹ Application Serial No. 87448330 was filed on May 12, 2017, based upon Applicant’s
allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the
Trademark Act, 15 U.S.C. § 1051(b). After the notice of allowance issued, Applicant filed on

The Trademark Examining Attorney refused registration under Sections 1 and 45 of the Trademark Act, 15 U.S.C. §§ 1051 and 1127, on the ground that Applicant has not submitted acceptable specimens showing use of its mark on any of the goods, all of which are identified as “medicated.” Applicant appealed and requested reconsideration,² which was denied. After the Board resumed proceedings, Applicant filed and the Board granted two requests to remand the application to the Examining Attorney, first to consider a proposed amendment to the identification of goods, which the Examining Attorney did not accept, and then to consider additional evidence, which did not overcome the refusal to register. The Board then resumed the appeal, Applicant and the Examining Attorney filed briefs, and Applicant filed a reply brief.

As explained below, we reverse the refusal to register because we find the original specimen submitted with the SOU shows use of Applicant’s proposed AGE IQ mark in connection with the identified Class 5 goods and it therefore is acceptable.

I. Background

In the SOU, Applicant identifies the specimen as an “online catalog with pricing and add-to-bag button.” This specimen, which is reproduced in full below, shows Applicant’s mark on a “day cream” and a “night cream” touted as “the ultimate combo for combating aging around the clock.”

October 24, 2018 a Statement of Use (“SOU”) alleging September 25, 2017 as the date of first use, and May 15, 2018 as the date of first use in commerce.

² Applicant submitted the aforementioned substitute specimen with its Request for Reconsideration.



Age IQ™ Night & Day Combo

Intelligent skincare has arrived with Nerium's Age IQ™ Night Cream and Age IQ™ Day Cream — the ultimate combo for combating aging around the clock. This pairing allows you to experience all the benefits of both products in one purchase!

Monthly Auto Delivery:
\$140

Save 26% (\$190 value) plus
Free Shipping over \$150

One-Time Purchase: **\$190**

ADD TO BAG



We know you're going to love it.
30-Day Money-Back Guarantee

The Examining Attorney refused to register Applicant's mark on the ground that the above online catalog specimen does not describe the identified goods as "medicated." The Examining Attorney noted that Applicant submitted the same specimen for Applicant's copending application (Serial No. 87448325) for (non-medicated) cosmetic preparations in Class 3, and the specimen was acceptable for those goods. November 26, 2018 Office Action, TSDR 1.

In traversing the refusal, Applicant points to an entry in MERRIAM-WEBSTER that defines "medicate" as "to treat (someone or something) with or as if with medicine." May 28, 2019 Response to Office Action, TSDR 1-2. Applicant contends that the specimen supports use in Class 5 because "Applicant's goods treat the signs of aging and contain anti-wrinkle preparations and are used to moisturize skin. This means

that the goods meet the definition of what a medicated product would be.” *Id.* at TSDR 1. Applicant also notes that the same specimen may be used in more than one class if the specimen supports use in each class, and Applicant’s use of the same specimen to support use in its application for Class 3 goods is “not problematic” because this application is only for a single class (Class 5), “the classes are distinguished in two different applications[,] and clearly the specimen supports the use of the mark in each class.” *Id.* at TSDR 1.

The Examining Attorney then made the refusal final, reiterating her previous arguments, and contending that “[i]n this case, the goods may only be medicated or non-medicated, they cannot be both.” June 4, 2019 Final Office Action, TSDR 1. In response to Applicant’s definitional argument, the Examining Attorney contends: “If applicant’s goods do not ‘treat (someone or something) with or as if with medicine’ as Applicant’s definition states, then applicant does not offer Class 005 goods. Treating the signs of aging is not the same thing as treating the signs of aging with medicine.” *Id.* at TSDR 1. She also explains the classification differences between goods in Classes 3 and 5, and the general presumptions relating to each, e.g., identifications for cosmetics or toiletry preparations generally are presumed to be non-medicated and classified in Class 3 if they do not specify that they are medicated or for pharmaceutical purposes; if the identifications do so specify, then they are classified in Class 5. She then states: “Here, applicant confirmed that its goods are medicated and justified in Class 005 rather than Class 003. Applicant may point out where ‘medicated’ is found on the specimens currently of record or may submit substitute

specimens that actually show applicant’s medicated products as they are sold in commerce.” *Id.* at TSDR 1.

In its request for reconsideration, Applicant submitted a substitute specimen identified as an “online display showing actual product with pricing and add to bag button.” December 4, 2019 Request for Reconsideration, TSDR 1. The substitute specimen, reproduced below, shows the mark on a sunscreen gel with “Broad Spectrum SPF 40” touted as an “innovative daily SPF” that “protects your face and neck from premature aging due to the sun’s ultraviolet rays, blue light from digital devices, and environmental stressors such as pollution and smoke.” *Id.* at TSDR 2.



The Examining Attorney denied the request for reconsideration because the substitute specimen does not show use of the mark with medicated cosmetic products: “The substitute specimen still does not have any ‘medicated’ wording or indication on it.” The Examining Attorney points to Applicant’s webpage for the sunscreen product

as evidence that “the ingredients are not medicated” and “the packaging does not include any ‘drug facts’ that usually appear on medicated goods or explanation about the ingredients that make the product ‘medicated.’” December 10, 2019 Request for Reconsideration Denied, TSDR 1. She also attached printouts from three websites offering medicated products “demonstrating how medicated cosmetic products include information about the medication element.” *Id.* at TSDR 1, 6-21.³

II. Applicable Law

In some cases, an applicant may seek registration in more than one International Class based on its use of the mark on a single product. In such cases, the identification of goods in each class must be appropriate, and the specimen(s) must be acceptable as evidence of use of the mark on the goods as identified in each class. For example, in *In re Int’l Salt Co.*, 166 USPQ 215 (TTAB 1970), the applicant filed two applications, one for “salt for food purposes,” and one for “salt for use in chemical industries,” using identical specimens. The examining attorney in the latter application refused registration, arguing that the specimen only showed use of the mark on salt for food purposes. The Board reversed the refusal, finding “that the examiner erred in refusing to accept the specimens filed as evidence of use of the mark.” *Id.* at 216. The Board explained:

³ As noted above, the Board twice granted Applicant’s request for remand, and Applicant and the Examining Attorney presented evidence and arguments on both occasions. *See generally* April 10, 2020 Request for Remand (11 TTABVUE), April 30, 2020 Office Action, October 30, 2020 Response to Office Action, and November 9, 2020 Subsequent Final Office Action; July 9, 2021 Request for Remand (21 TTABVUE) and July 13, 2021 Request for Reconsideration After Final Denied. We have reviewed the evidence and arguments, but we do not cite to them specifically in this decision.

There can be no question but that a product such as salt may be used both for food purposes and for use in chemical industries. It is settled, moreover, that the owner of a trademark has a right to register the trademark for a particular product in a plurality of classes covering the different purposes or uses of the article that happens to fall within two or more classification classes instead of the usual single class. *See Mead Johnson Co. v. Watson*, 112 USPQ 284 (D.D.C. 1957), *aff'd*, 117 SUPQ 13 (D.C. Cir. 1958). The only possible restriction on this right is that the specimens filed in any particular class should reflect use of the mark in connection with the product for the use set forth in the application or, conversely, the specimens should not be of a nature or contain language which would, on their face, restrict the product to but a single purpose or use. In those instances where the specimens are of a general utility, and there is nothing on their surface or in the record to suggest that they cannot possibly be used for the purpose enumerated, the examiner is obligated to accept the statement under oath in the application that the specimens are so being used.

In the instant case, the specimens filed are photographs of the packages in which the salt is shipped; the packages are 100-pound bags; the only product identification thereon is simply the word "Salt" without any indication thereon as to any or all intended uses of the products; and applicant, under oath, has alleged that "The mark is used by imprinting it on packages containing the goods"

Id. at 215-16 (internal citation revised). *See also* TMEP § 904.01(a) (July 2022) ("If a single specimen supports multiple classes, the applicant should indicate which classes are supported by the specimen.") and TMEP § 1401.05(c) ("if it can be shown that a product has a plurality of uses or aspects so that two or more classes apply, multiple classification may be permissible.").

Further, the Federal Circuit previously has found that a single product may have dual uses as both a cosmetic in Class 3 and a pharmaceutical preparation in Class 5, where there is testimony to support such use, and the specimens do not contradict

the dual classification. *Jean Patou, Inc. v. Theon, Inc.*, 9 F.3d 971, 29 USPQ 117, 1774 (Fed. Cir. 1993).

Here, Applicant has stated, under oath, that the specimens are used in connection with the identified Class 5 goods, and the specimens do not contradict this attestation. *Id. See also Int'l Salt*, 166 USPQ at 215 (“the examiner is obligated to accept the statement under oath in the application that the specimens are so being used”). The Examining Attorney has pointed to no legal authority or examination guidance that require specimens for “medicated” goods (or any Class 5 goods) to specifically state that they are “medicated,” or to include “drug facts” or information about the ingredients, and we are aware of none. Moreover, the lack of the word “medicated” on the specimens does not mean that the goods are not “medicated,” as set forth in the identification of goods. On this record, there is no reason to believe that the day cream and night cream displayed on the original specimen (which also supported Applicant’s use of the mark for Class 3 products in the copending application) does not serve a dual purpose, both cosmetic and medicated.

III. Conclusion

For the reasons discussed above, we find Applicant’s original specimen acceptable to show use of the mark AGE IQ on the identified goods in Class 5.

Decision: The refusal under Sections 1 and 45 of the Trademark Act is reversed.